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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-673

GETTY OIL COMPANY (EASTERN OPERATIONS), INC., A DELAWARE CORPORATION, PETITIONER

v.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. A, pp. 6–37) is reported at 342 F. Supp. 1006. The opinion of the court of appeals (Pet. App. A, pp. 39–53) is reported at 467 F. 2d 349.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1972. The petition for a writ of certiorari was filed on November 1, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 307(b) of the Clean Air Act bars, as untimely, judicial review of petitioner's challenge to an order issued by the Administrator of the Environmental Protection Agency directing Delmarva Power & Light Company to comply with a federally approved state regulation banning the burning of fuel which has a sulfur content in excess of 3.5 percent by weight.

STATUTES INVOLVED

Section 307(b) of the Clean Air Act of 1970, 84 Stat. 1708, 42 U.S.C. 1857h–5(b), provides:

> (1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d) may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.
>
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial

review in civil or criminal proceedings for enforcement.

* * * *

Section 102(2)(C) of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332(2)(C), is set forth at Pet. 7–8.

STATEMENT

The material facts are not disputed. Petitioner, Getty Oil Company (Eastern Operations), Inc., operates a crude oil refinery in Delaware City, New Castle County, Delaware. One of the natural byproducts of its refining operations is fluid petroleum coke, which generally has a sulphur content of between 6 and 7 percent by weight. Pursuant to a contractual arrangement with Delmarva Power & Light Company ("Delmarva"), petitioner, by conveyor, transfers this fluid coke byproduct daily (a maximum of 1,500 tons per day) to a nearby power station owned and operated by Delmarva, where it is burned to produce electricity and steam for the refinery. If any electricity is left over after the requirements of the refinery have been met, it is sold by Delmarva to the public.

In September 1970, the Delaware Water and Air Resources Commission held public hearings on proposed air pollution regulations for the State of Delaware. Among the regulations considered was one limiting to 3.5 percent the sulphur content of fuel burned by a certain size plant in the region where the Delmarva power station is located. Petitioner and Delmarva appeared at the hearings and argued against adoption of this proposal. The Commission, however, approved the regulation on October 13, 1970; it pro-

vided that "after January 1, 1972, fuel having a sulphur content greater than three and five-tenths percent (3.5%) by weight shall not be utilized in the area south of U.S. Route 40 in New Castle County for fuel burning equipment having a maximum rate of heat input equal to or greater than 500,000,000 b.t.u. per hour" (Regulation XV).

The Delmarva power plant is the only installation in the specified area having the size equipment designated in the regulation, and thus alone must meet the 3.5 percent limit. This compares, however, with a one percent limit on sulphur content imposed by separate regulation on the other facilities having fuel burning equipment with smaller capacity (Pet. App. A, p. 8).

Neither petitioner nor Delmarva contested the Commission's approval of the sulphur emission regulations in the Delaware courts (see Pet. App. A, p. 8, n. 1). They became part of the State's implementation plan for attainment and maintenance of primary ambient air quality standards for sulphur dioxide, promulgated by the Administrator of the Environmental Protection Agency ("EPA") under the Clean Air Act, 42 U.S.C. 1857c–4, and were submitted to the Administrator for federal approval. On August 4, 1971, the Administrator approved the sulphur dioxide portion of the Delaware implementation plan.[1]

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[1] As pointed out by the district court (Pet. App. A, p. 8): "While this approval received substantial publicity at the time and presumably came to [petitioner's] attention shortly after the action was taken, notice of the approval was not published in the Federal Register until February 3, 1972."

No objection to federal approval was raised by petitioner, or anyone else, during the 30-day period specified in Section 307(b)(1) of the Clean Air Act as the time within which to challenge such a decision by the Administrator. 42 U.S.C 1857h–5(b)(1). More than a month after federal approval, on September 28, 1971, petitioner applied to the Secretary of the Delaware Department of Natural Resources and Environmental Control (hereafter the "State Secretary") for a "variance" from the January 1, 1972 effective date of the 3.5 percent regulation. It based its application on the claim that national primary air quality standards for sulphur dioxide were already being met in the New Castle County area, and thus Delmarva could be allowed additional time to meet the State's sulphur emission requirement without endangering public health and welfare (Pet. App. A, p. 9). The power station burned each month approximately 110,000,000 pounds of fluid coke having a sulphur content of 6.91 percent—almost twice the allowable rate.

On December 28, 1971, the State Secretary denied the variance application. Contrary to petitioner's assertion, he determined that "compliance with the national sulphur dioxide primary standard would be achieved no earlier than late 1975 or early 1976" (Pet. App. A, p. 42, n. 6), if Delmarva were permitted to continue burning Getty's fluid coke byproduct. Such permission, the State Secretary concluded, "was precluded by the Clean Air Act and federal regulations promulgated thereunder" (*ibid.*).

Petitioner promptly appealed the State Secretary's denial to the Delaware Water and Air Resources Com-

mission ("WARC"); at the same time it sought in the Delaware Chancery Court a temporary restraining order against enforcement of the 3.5 percent sulphur emission regulation by the State Secretary while its appeal to WARC was pending. The restraining order was granted on December 30, 1971 (Pet. App. A, p. 42).[2]

On January 1, 1972, the Delaware sulphur dioxide regulations became effective. Six weeks later, EPA requested and received from Delmarva a statement of the sulphur content of fuel burned by its power station during January; similar statements were subsequently furnished for the months of February and March. On March 6, 1972, the Administrator advised Delmarva that it was in violation of the federally approved regulation limiting the content of sulphur by weight to 3.5 percent. At the request of both Delmarva and petitioner, a conference with representatives of EPA was held on March 20, 1972, to give the companies an opportunity to be heard. 42 U.S.C. 1857c–8(a)(4). Following that conference, it was determined that a violation of the regulation existed and had continued for more than 30 days after the initial notice thereof. On April 17, 1972, the Administrator, pursuant to his authority under Section 113 (a)(1) of the Clean Air Act (42 U.S.C. 1857c–8 (a)(1), ordered Delmarva to comply with the 3.5 percent sulphur requirement by May 1, 1972 (Pet. App. A, pp. 43–44, n. 10).

[2] Thereafter, petitioner wrote WARC and requested that action on its appeal be deferred pending the outcome of litigation in the federal and state courts. No further action has been taken by WARC (Pet. App. A, p. 42, n. 7).

Petitioner then commenced the present suit in the United States District Court for the District of Delaware on April 21, 1972, seeking preliminary and permanent injunctive relief and a temporary restraining order staying the effect of the Administrator's compliance order. Delmarva did not join in the suit; it filed an affidavit with the court expressing its intent to comply with the Administrator's order "unless relieved of compliance by an order of this Court pursuant to the application of Getty Eastern," and stating that it would "not run the risk of incurring criminal fines and jail sentences which might be imposed if it did not comply" (Pet. App. A, p. 11). Compliance would require the use of different fuel at the power station, the cost of which would be passed on to petitioner and Delmarva's other public customers. As a result, petitioner no longer would be able to receive its electric power from Delmarva essentially free of costs; instead, it estimates that the cost would be approximately $10,000 per day (Pet. 11).

The district court held that this estimated economic burden gave petitioner standing to challenge the Administrator's action (Pet. App. A, p. 13, n. 4), and that review of the issues presented was not precluded by the Clean Air Act (*id.* at pp. 18–19). Petitioner was denied all relief, however, since the district court considered "the likelihood of Getty's success on any of [its] arguments [on the merits] very slim" (*id.* at p. 22).

The court of appeals disagreed with the district court on the jurisdictional question. In its view, petitioner's "belated effort to attack Regulation VIII

[renumbered from Regulation XV] in the guise of pre-enforcement review of the compliance order is precluded by section 307 of the Clean Air Act" (Pet. App. A, p. 53). "This appeal," it concluded (*ibid.*), "is a paradigm of confession and avoidance." The case was remanded to the district court with instructions to dismiss for lack of jurisdiction.

ARGUMENT

The decision of the court of appeals is correct and does not warrant review by this Court. Petitioner recognizes that Section 307(b)(1) of the Clean Air Act precludes it from making a direct attack in the federal courts on the questioned sulphur emission regulation more than 30 days after the regulation receives EPA approval.[3] It seeks to avoid this provision, however, on the ground that the present suit is a challenge, not to the regulation *per se,* but to the regulation as applied to Delmarva under the Administrator's compliance order (Pet. App. A, p. 12).[4] But this

[3] Section 307(b)(1), 42 U.S.C. 1857h-5(b)(1), provides for review of the Administrator's approval of a state implementation plan under section 110 of the Act only by filing a petition "in the United States Court of Appeals for the appropriate circuit * * * within 30 days from the date of such * * * approval * * *."

[4] While petitioner may well have "standing" to challenge the validity of the regulation in a Section 307 proceeding, we do not believe it follows that petitioner also has "standing" to object to a compliance order directed at Delmarva. It is simply inaccurate for petitioner to claim that *it* will be subjected to "the imposition of criminal penalties if its challenge [here] fails * * *" (Pet. 15). The "standing" question need not be resolved in this case, however, since the federal courts have jurisdiction to decide the issues presented only in accordance with the procedure prescribed by Section 307.

argument conveniently ignores the fact that the 3.5 percent limitation on sulphur content imposed by the State of Delaware is not generally applicable to a number of facilities. It affects *only* the Delmarva power station, and in effect already gives that facility a special "variance" from the general one percent limitation on sulphur content that applies to the other fuel burning plants in the State (see p. 4, *supra*).

1. Petitioner contends that the Administrator's order to comply with the regulation by May 1, 1972, is unreasonable and constitutes an abuse of discretion. Its position is grounded on a claim of extreme economic hardship, and on the assertion that compliance by that date is unnecessary because the national primary air quality standards have already been achieved in New Castle County. But these are arguments pertaining to the validity of the sulphur dioxide regulation itself, which both in its application and effect differs from the compliance order only in that it sets an earlier date, January 1, 1972, for meeting the 3.5 percent requirement. As pointed out by the court below, petitioner has raised no issues in this suit which could not properly have been raised in a timely Section 307 proceeding (Pet. App. A, pp. 46, 48–49). There is no factual dispute here regarding the Administrator's issuance of the compliance order; the Delmarva power station concededly continues to burn petitioner's fuel having almost twice the allowable rate of sulphur content.[5]

[5] This is plainly not the hypothetical "close case" to which the district court made reference (Pet. App. A, p. 19). Nor does it follow from the decision below that "where there is an honest difference of view as to whether a particular establish-

In these circumstances, petitioner, having failed to make a timely objection in the court of appeals to a regulation pertaining only to its supplier of electric energy, cannot thereafter encourage its supplier openly to flout that regulation and then attack its validity "in the guise of pre-enforcement review" (Pet. App. A, p. 53) when Delmarva is ordered to comply. This is precisely the type of delay-tactic that Congress sought to prevent in Section 307 by designating the United States Courts of Appeals as the exclusive forums for judicial review of challenges such as the one raised here, and by limiting access to the appellate courts to 30 days from the date of federal approval of the contested regulation. See *Kennecott Copper Corp.* v. *Environmental Protection Agency*, 462 F. 2d 846, 849 (C.A.D.C.).[6]

ment is or is not in compliance with an applicable regulation" (*ibid.*), pre-enforcement judicial review would necessarily be unavailable. We need not speculate here, however, on the extent of judicial review in such hypothetical circumstances. For, in this case, as the court of appeals noted (Pet. App. A, p. 50, n. 14), "the allegations presented in the district court and on appeal constitute a direct challenge to the necessity, reasonableness and constitutionality of Regulation VIII."

[6] Congress has chosen similar procedural techniques in other regulatory fields to accomplish the same objective. The National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, 15 U.S.C. 1381, provides for review of safety standards in the courts of appeals within 60 days of promulgation. *Automobile Parts & Accessories Association* v. *Boyd*, 407 F. 2d 330 (C.A.D.C.). A 60-day period for testing the validity of price control orders was affirmed in *Yakus* v. *United States*, 321 U.S. 414, where defendants were precluded from raising the invalidity of the orders in later criminal prosecutions. And compare *White* v. *Johnson*, 282 U.S. 367, where a party's attempt to raise constitutional issues was rejected because of his failure to appeal administrative action to the court of appeals as the statute required.

2. It will, of course, be a rare case when enforcement of an anti-pollution regulation does not impose economic burdens on those who must meet the clean air requirements. But the cost of compliance is plainly a matter for consideration in assessing the Administrator's approval of the state regulation in accordance with the review procedure prescribed by Section 307, especially where, as here, the regulation affects but one facility. The fact that petitioner will henceforth be deprived of free electric power and must, as its competitors are required to do, pay the going rate for fuel having an acceptable sulphur content, provides no basis for allowing it to raise at this late date an objection to the compliance order on the basis of an alleged economic burden that could have been fully considered in Section 307 proceedings. Indeed, even on the merits, as the district court accurately observed (Pet. App. A, p. 36), petitioner's "private interest in continuing to do business as it has done in the past is insufficient to frustrate Congress' desires in its regulation of public health and safety." [7]

[7] The district court also pointed out (Pet. App. A, pp. 27-28): "It is undisputed that low sulphur fuel is available and that, at the time of the issuance of the order, compliance by May 1, 1972 was feasible. [Petitioner] does not suggest that compliance with the regulation on May 1, 1972 would impose any greater or different burden upon it than compliance three months from now. Its argument that the May 1, 1972 date was arbitrary and unreasonable would apply to any date prior to the availability of alternative control technology. According to its best estimates this will probably be 1976. This is obviously not the type of consideration which Congress meant the Administrator to consider in setting a compliance date under Section 113(b)(4)."

Similarly, the claim that the 3.5 percent limitation is unnecessary because New Castle County already meets national primary air quality standards is an argument that should have been made in a Section 307 proceeding. Both the State of Delaware and the federal government have determined that the regulation is essential to meet the clean air objectives of the federal statute, and that determination was explicitly reaffirmed by the State Secretary in denying petitioner's application for a "variance." Petitioner has failed to suggest any reason why it should be permitted to continue violating an essential part of the State implementation plan so it can litigate a factual question that it failed to raise at the proper time (see Pet. App. A, pp. 51–52).

3. Nor is there substance to petitioner's claim that the decision below amounts to a deprivation of due process. As the court of appeals stated (Pet. App. A, p. 47): "A review of the tangled procedural history preceding [petitioner's] institution of this suit convinces us that due process has been satisfied." After briefly summarizing the events leading up to the present suit, the court below added (Pet. App. A, p. 48), "[i]n light of the above, [petitioner's] protestations that the doctrines of ripeness and justiciability would have foreclosed it from obtaining meaningful review are frivolous." These conclusions are fully supported by the record.[8]

[8] Petitioner argued below that enforcement of the regulation prior to a determination by WARC of its variance application will deny it procedural due process. As the district court pointed out, however, in rejecting this contention (Pet. App. A, pp. 25–26): "What [petitioner and Delmarva] are now trying to do in the variance proceeding is to persuade the Commission that a

Moreover, it is well established that due process does not require that identical procedural rights be afforded with respect to every government action that deprives an individual of a property interest. See *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 599. As pointed out by the district court below (Pet. App. A, p. 32), "the scope and nature of the procedures demanded are dependent upon a balancing of the precise nature of the governmental function involved and the private interests affected by the governmental action." See *Boddie* v. *Connecticut*, 401 U.S. 371, 378; *Goldberg* v. *Kelly*, 397 U.S. 254; *Bowles* v. *Willingham*, 321 U.S. 503, 520–521. Where, as here, there is a valid public interest to be protected—*i.e.*, the achievement, "as expeditiously as practicable" (42 U.S.C. 1857c–5 (a)(2)(A)), of national primary ambient air quality standards to protect public health—this Court has sustained in other contexts summary enforcement procedures by the administrative agency involved against a due process challenge. Compare *Sniadach* v. *Family Finance Corp*, 395 U.S. 337; *Boddie* v. *Connecticut*, *supra*. Application of that principle is especially appropriate in the present case, both because of the availability of the procedure prescribed by Section 307 (if timely invoked) for review of the regulations

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better rule as applied to their situation would not require 3.5% until some later date. [They] may or may not be successful in this effort and the required further effort to persuade the Administrator that such a rule would not prevent attainment of the national standard within the pertinent time period. But the Constitution does not require that they be excused in the meanwhile from complying with the regulation." The court of appeals agreed (Pet. App. A, pp. 50–51).

(see cases cited and discussed in note 6, *supra*) and because, as the district court pointed out below (Pet. App. A, p. 36), "[a] holding creating a constitutional procedural due process right to pre-enforcement judicial review would permit any person to delay enforcement by raising even a frivolous challenge to the [Administrator's] determination."[9]

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1972.

[9] Petitioner's additional claim concerning the failure of the EPA Administrator to file an environmental impact statement in connection with his approval of the Delaware sulphur dioxide regulation is also foreclosed by his failure to raise the issue in a Section 307 proceeding. In any event, both the district court (Pet. App. A, pp. 28–31) and the court of appeals (*id.* at pp. 52–53) correctly ruled that Congress did not intend the impact statement requirements to apply to a determination by the EPA Administrator concerning federal approval or disapproval of all or part of a state implementation plan. As pointed out by the district court (*id.* at 31), "to require the interagency consultation and impact statement stipulated by the [National Environmental Policy Act] would seriously and unnecessarily impede effective enforcement of the Clean Air Act and similar federal regulatory programs."

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